> under the direction of the legislature; and if, on such census, it shall appear that the number of senators is not justly proportioned to the several districts, that the legislature adjust the proportion, as near as may be, to the number of freeholders, qualified as aforesaid, in each district."

SUMMARY OF ARGUMENT

The District Court's decision rests on the erroneous (and sweepingly overbroad) assumption that "[u]nless and until Congress chooses to act, the states' power to redistrict remains unlimited by constitutional text." *Session v. Perry*, 298 F.Supp.2d 451, 459 (E.D. Tex. 2004), *vacated and remanded sub. nom. Henderson v. Perry*, No. 03-9644, __ U.S. ___, 125 S.Ct. 351 (Oct. 18, 2004). This extraordinary judicial promulgation and delegation of unprecedented power to State legislatures, untethered by any requirement of a legitimate regulatory purpose, invites if it does not guarantee Nationwide electoral turmoil, electoral instability, and a denial of meaningful representation in the United States Congress to millions of American voters, including Appellee and his rural East Texas neighbors.

Once valid districts are established after a federal apportionment, no residual constitutional power remains vested in a State legislature to authorize alteration of congressional districts *in the absence of a neutral, legitimate regulatory purpose*. In support of this conclusion, Appellee would draw this Court's attention to (as set out in greater detail herein):

1) A comparison of the Elections Clause with contemporaneous State constitutional provisions in effect at the time the Elections Clause was

adopted, on which the Framers purported to model the Constitution;

2) Evidence of the usage of the Elections Clause power by the several State legislatures during the first decade of the Republic;

3) An editorial published in the *New-York Herald* on April 27, 1808, that reflects the contemporary understanding of the temporal scope of redistricting power under the Elections Clause; and

4) An insightful legal opinion and analysis written by renowned jurist Chancellor James Kent, delivered by Kent while Chief Justice of the New York Council of Revision in 1809, that addresses multiple intra-census electoral redistricting, and construes a redistricting provision on which the Elections Clause was modeled.

Regulation of congressional districts by a State legislature, like revision of State legislative districts, must be undertaken pursuant to a "reasonably conceived plan for periodic readjustment of legislative representation".[3] The intent of the Framers was that *population* would govern any prescription or alteration of congressional election districts;[4] and it is settled law that the "basic aim" of the Framers under the Elections Clause was to ensure "fair and effective representation for all citizens."[5]

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[3] *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

[4] *Wesberry v. Sanders*, 376 U.S. 1, 8-9 (1964) ("[T]hose who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.").

[5] *Vieth v. Jubelirer*, supra, 541 U.S. at 307 (Kennedy, J., concurring in judgment) (italics added), *quoting Reynolds v. Sims*, supra, 377 U.S.

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While the foregoing guidelines generally shape the outer contours of the power delegated to State legislatures by the Elections Clause, other equally important but more specific countervailing factors must be considered when defining the power delegated. This Court, for example, has held that "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system".[6] A fair expression of this "need for stability and continuity", against which any exercise of Elections Clause power must be balanced, appropriately includes recognition that representational harm to some voters necessarily results from any substantial alteration of congressional districts; and that "[i]ntelligent voters, regardless of party affiliation" reasonably "resent . . . political manipulation of the electorate for no public purpose".[7] As the Appellee will show, the Framers of the Federal Constitution weighed these considerations when adopting the Census and Election Clauses.

With these factors in mind, Appellee argues that absent a demonstration of exigent or extraordinary circumstances, any "reasonably conceived plan" adopted by a State legislature to alter valid congressional districts implemented by a federal court in a final judgment, must be supported by a legitimate and neutral regulatory

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at 565-566; *Vieth v. Jubelirer*, supra, 541 U.S. at 320 (Stevens, J., dissenting) (same); *id.*, 541 U.S. at 343 (Souter, joined by Ginsburg, JJ., dissenting) (same).

[6] *Reynolds v. Sims*, supra, 377 U.S. at 583.

[7] *Vieth v. Jubelirer*, supra, 541 U.S. at 322 n. 6 (Stevens, J., dissenting), *quoting Davis v. Bandemer*, 478 U.S. 109, 177 (1986) (Powell, J., concurring in part and dissenting in part).

purpose that takes into account, and is justified by, shifts or growth in population unaccounted for since congressional districts have last been established.

ARGUMENT

The District Court concluded that because the Elections Clause does not *constitutionally require* promulgation of congressional districts, it "presumably . . . never entered the Framers' minds" that the Elections Clause would in any manner limit the frequency of congressional redistricting by the States after each federal decennial census. *Session v. Perry*, supra, 298 F.Supp.2d at 460. The District Court's analysis, in this regard, is fundamentally flawed in at least four critical respects. First, the District Court's "presumption" (about what "never entered the Framers' minds") is predicated solely on its passing observation that there is no explicit districting requirement in the Elections Clause. To this extent, the District Court's analysis conflicts with *Wesberry v. Sanders*, supra, 376 U.S. at 7 (construing Article I, Section 2 "in its historical context"); for if absence of any explicit districting requirement in the Elections Clause, without resort to "historical context", were determinative of the question presented by Appellants, then it would likewise be true that no constitutional prohibition against nonequipopulous congressional districts could exist, as the literal terms of Article I do not textually require elections by districts, much less by equipopulous districts. Second, the District Court's "presumption" (about what "never entered the Framers' minds") is flawed not only by its disregard of substantial contemporaneous evidence that the Framers assumed congressional districts (and not only "general

ticket" regulations) would be established by the States; but also by its failure to recognize the existence of colonial era regulations that did, in fact, contain temporal restrictions on the frequency of electoral redistricting at the time the Elections Clause was framed. Third, the District Court's decision wholly failed to take into account the behavior of the State legislatures during the first decade after the first federal enumeration and apportionment, which discloses that among the States *that used population* to govern their representation, none engaged in multiple intra-decennial congressional redistricting in the absence of a neutral regulatory purpose, *i.e.*, without justification of an intervening census conducted under State law demonstrating the need to adjust representation. Fourth, and finally, the District Court's conclusion directly conflicts with contemporaneous evidence which discloses that, at least as early as the second federal census and apportionment, the general electorate (and at least one governing body) understood multiple intra-census redistricting, in the absence of a legitimate regulatory purpose, to be constitutionally prohibited.

I. Comparison of the Elections Clause with Contemporaneous State Constitutional Provisions in Effect at the Time the Elections Clause was Adopted, on which the Framers Purported to Model the Constitution.

The record of debate at the Federal Constitutional Convention of 1787, as well as the debates at the several State ratification conventions, signals awareness on the part of the Framers that the manner of electing representatives

to the National Legislature would in most States involve elections by districts.[8] The fact that some States after ratification of the Elections Clause chose initially to adopt the "general ticket" system to regulate congressional elections, *Session v. Perry*, supra, 298 F.Supp.2d at 460; says nothing about whether the Framers expected the Elections Clause to limit the frequency of redistricting when States chose to enact, as they had previously, districting regulations for holding their elections.

When drafting the Federal Constitution, the Framers sought "[t]o use simple and precise language, and general propositions, *according to the example of the (several) constitutions of the several states*,"[9] and this Court in the past has properly looked to these State constitutions, adopted during the "Founding Decade" (1776-1786), to interpret analogous provisions of the Federal Constitution.[10] At the time of the Federal Convention in 1787, at

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[8] *E.g.*, 3 *The Records of the Federal Convention of 1787*, 110 (Farrand ed. 1911) (hereinafter "*Farrand*") (C. Pickney pamphlet, May 28, 1787) ("The districts, into which the Union are to be divided, will be apportioned, as to give each its due weight."); 1 *Farrand*, 48-49 (George Mason, May 31, 1787) (House of Representatives should be elected "from different districts" to reflect the "views arising from difference of produce, of habits, &c. &c."); 1 *Farrand*, 132-133 (Elbridge Gerry, June 6, 1787) ("[t]he people should nominate persons in certain districts"); 1 *Farrand*, 134 (George Mason, June 6, 1787) ("there [is] a better chance for proper elections by the people, if divided into larger districts, than by the State Legislatures"); 1 *Farrand*, 179-180 (James Wilson, June 9, 1787) ("Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."); and, 1 *Farrand*, 300 (Alexander Hamilton, June 18, 1787) (proposing that House of Representatives be elected "by the people in districts").

[9] Committee of the Detail, 2 *Farrand* at 137 (italics added).

[10] A summary of the influences that early state constitutions had on the framing of the Federal Constitution in 1787 appears in *Williams*,

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least nine of the thirteen original colonies had already enacted their own State constitutions.[11] All nine of these had provided for election to State legislative offices by territorial subdivisions of their respective States, *i.e.*, by towns, counties, parishes or districts.[12] Three of these nine colonies, Pennsylvania, New York, and South Carolina, had constitutions that provided for the return of a census or enumeration of their populations to govern, in whole or in part, their electoral representation.[13] Section 17 of the Pennsylvania Constitution of 1776 required an enumeration of "taxable inhabitants" of that commonwealth; provided for districts consisting of "the City of Philadelphia and each county of the commonwealth"; and ordained proportional "representation to each . . . which representation shall

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The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influence on American Constitutionalism, 62 Temp.L.Rev. 541, 542-544 (Spring-Summer 1989) (hereinafter "*Williams*").

[11] These colonies were Pennsylvania (1776), 5 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, 3081 (1909) (hereinafter "*Thorpe*"); New Jersey (1776), 5 *Thorpe*, 2594; Massachusetts (1780), 3 *Thorpe*, 1888; Maryland (1776), 3 *Thorpe*, 1686; South Carolina (1778), 6 *Thorpe*, 3248; New Hampshire (1784), 4 *Thorpe*, 2453; New York (1777), 5 *Thorpe*, 2623; North Carolina (1776), 5 *Thorpe*, 2787; and Georgia (1777), 2 *Thorpe*, 777.

[12] Pa.Const., Section 17 (1776) (district and counties), 5 *Thorpe*, 3086; N.J.Const., Art. III (1776) (counties), 5 *Thorpe*, 2595; Mass.Const., Part II, ch. I, sec. II, Art. II (1780) (towns and districts), 3 *Thorpe*, 1895; Md.Const., Art. III (1776) (counties), 3 *Thorpe*, 1691; S.C.Const., Art. XII and XIII (1778) (parishes and districts), 6 *Thorpe*, 3250-51; N.H.Const., Part II (1784) (districts), 4 *Thorpe*, 2459; N.Y.Const., Art. IV, V, and VIII (1777) (counties and districts), 5 *Thorpe* 2629-30; N.C.Const., Art. III (1776) (counties and towns), 5 *Thorpe*, 2790; and Ga.Const., Art. IV (1777) (counties), 2 *Thorpe*, 778.

[13] Pa.Const., Section 17 (1776), 5 *Thorpe*, 3086; N.Y.Const., Art. V and XII (1777), 5 *Thorpe*, 2630-31; and S.C.Const., Art. XV (1778), 6 *Thorpe*, 3252.

continue for the next seven years afterwards at the end of which, a new return of the taxable inhabitants shall be made, and a representation agreeable thereto appointed by the said Assembly, and so on septennially forever."[14] Article V of the New York Constitution of 1777 provided that a census be taken "once ever [sic] seven years", and that "if it shall thereupon appear that the number of electors in any county shall have increased or diminished.... the number of representatives for such county shall be increased or diminished accordingly."[15]

While the State Constitutions of both Pennsylvania and New York, like the Federal Constitution of 1787 that would follow, recognized that population alone (unaffected by considerations of property) would govern representation in their respective House of Representatives; the South Carolina Constitution of 1778, in contrast, allowed consideration of both population and property assessments, and provided that "at the expiration of seven years after the passing of this constitution, and at the end of every fourteen years thereafter, the representation of the whole State shall be proportioned in the most equal and just manner according to the particular and comparative strength *and* taxable property of the different parts of the same, regard being always had to the number of white inhabitants *and* such taxable property."[16] Thus, only the

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[14] 5 *Thorpe*, 3086.

[15] 5 *Thorpe*, 2629-2630. Article XII of the same constitution similarly provided that a census be taken "once every seven years," and that the State Legislature "adjust the proportion," "as near as may be," whenever "on such census" it appeared that the senatorial districts were "not justly apportioned". 5 *Thorpe*, 2631.

[16] S.C.Const. of 1778, Article XV, 6 *Thorpe*, 3252 (italics added).

States of Pennsylvania and New York, prior to ratification of the Federal Constitution in 1788, relied, in their respective State constitutions, exclusively on population to govern electoral representation. On the basis of this distinction, scholars have concluded that the Pennsylvania and New York State Constitutions provided the model for federal representation in the U.S. House of Representatives.[17]

The concept adopted in Section 17 of the Pennsylvania Constitution of 1776, *i.e.*, that representative districts would be governed solely by population, and that districts, once established, "shall continue for the next seven years" (until the taking of a subsequent census), was a topic of contemporaneous public discussion in Philadelphia at the time Section 17 was framed.[18] Only weeks earlier Thomas Paine had published at Philadelphia his *Four Letters on Interesting Subjects*; and in the last of these letters, while

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[17] *E.g.*, Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*, 109 (LSU Press 1980) ("Section 2 of Article I in the United States Constitution has its origin in the provisions first found in the Pennsylvania and New York constitutions."); *Williams*, supra, 62 Temp.L.Rev. at 579 (Article I, Section 2 "was clearly patterned on state provisions like Pennsylvania's" Section 17); Robinson, *The Original and Derived Features of the Constitution*, 1 Annals Am. Acad. Pol. & Soc. Sci. 203, 213 (1890-1891) ("The constitution of New York is a particularly striking precedent, in that it provided for a readjustment of the representation after a periodic *census*.") (italics in original). When writing "To the People of New York" in *The Federalist* No. 1, Hamilton reassured his readers that the Federal Constitution was "analogous" to the New York Constitution of 1777. (Oct. 27, 1787).

[18] The Pennsylvania State Constitutional Convention of 1776, at which Benjamin Franklin was unanimously elected Presiding Officer, met at Philadelphia from July 15 to September 29, 1776. *Selsam, The Pennsylvania Constitution of 1776*, 147, 163-164 (New York, Octagon reprint 1971) (hereinafter "*Selsam*").

outlining his proposals for the new Pennsylvania Constitution, Paine had written that:

> "A CONSTITUTION should lay down some permanent ratio, by which the representation should afterwards encrease [sic] or decrease with the number of inhabitants; for the right of representation, which is a natural one, *ought not to depend upon the will and pleasure of future legislatures.*"[19]

Thomas Paine's proposal that alterations of representation should not afterwards "depend on the will and pleasure of future legislatures," but instead only upon "encreases or decreases" in population, was a reform directed at widely recognized political abuses under the proprietary charter of William Penn. Although political representation in Pennsylvania under William Penn had initially been more egalitarian than under other provincial charters,[20] over time the Pennsylvania Assembly had come under the aristocratic control of mercantile factions among Pennsylvania's eastern inhabitants. By 1776, as Justice Scalia has noted, the loyalist colonial Pennsylvania Assembly had resorted to various means to entrench its hold on power, and to deny fair representation to Pennsylvania's rural western inhabitants and the laborers and

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[19] *Four Letters on Intersting Subjects* (Styner & Cist, Philadelphia) (May 22 – July 2, 1776), *reprinted in* Wood, *Common Sense and Other Writings*, 57, 78 (Random House, 2003) (italics added). The first scholar to recognize Paine as the author of these letters has characterized this quoted passage as akin to Paine's earlier "protest[s] against the 'undue authority' which the Pennsylvania Assembly obtained over the delegates to the Continental Congress." *See* Aldridge, *Thomas Paine's Ideology*, 235 (1984).

[20] *Selsam*, supra, 8.

mechanics residing in more urban Philadelphia.[21] Given the contemporaneous evidence of the prevailing resentment in Pennsylvania against property qualifications for suffrage and representation unequal to population, and the evident hostility in 1776 among the disfranchised in Pennsylvania to the prospect of future electoral regulation motivated by partisan purpose,[22] it is apparent that the Framers of Pennsylvania's Constitution of 1776, when adopting Section 17, sought by permanent constitutional regulation to prevent "future legislatures" from altering representation for reasons not related to "encreases or decreases" in population.

On September 5, 1776, the Pennsylvania State constitutional convention ordered that a draft of its proposed constitution be published in a pamphlet for public consideration; and this draft was thereafter printed in both pamphlet form and in local newspapers inviting public comment.[23] As originally resolved by the convention "after

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[21] *Selsam*, 2-3, 31-34. *See also, Vieth v. Jubelirer*, supra, 541 U.S. at 274 (plurality opinion per Scalia, J.) ("at the beginning of the 18th century . . . several counties [in colonial Pennsylvania] conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives"), citing *Griffith, The Rise and Development of the Gerrymander*, 26-28 (Arno Press reprint, 1971) (hereinafter "*Griffith*").

[22] The call for a new Pennsylvania State constitution was precipitated by the unanimous vote of "[b]etween four and five thousand people assembled, in spite of the rain," at the Pennsylvania State House (now Independence Hall) on May 20, 1776. One written complaint of these demonstrators was that the sitting Assembly through electoral manipulation had conducted elections "to the Exclusion of many worthy inhabitants." *Selsam*, 118-119.

[23] *Shaeffer, Public Consideration of the 1776 Pennsylvania Constitution*, 98 Pa. Mag. Hist. & Biog. 415, 419 (1974) (hereinafter "*Shaeffer*"). A

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considerable debate," the first draft of Section 17 provided for electoral districts; but voting under this original proposal was to be regulated "in one general ticket out of the County at large," and no mention of an enumeration or census to ensure equal representation was included.[24] In response to the publication of this proposal, an anonymous writer, identifying himself under the pseudonym "Demophilus," timely objected to elections by general ticket and, alluding to his own recently published pamphlet, *The Genuine Principles of the Ancient Saxon, or English Constitution*, observed that "[w]hen candidates are all put up together in a county ticket, they are to be considered the favorites of a junto."[25] There were also, however, certain objections to elections by districts based on equal population, of which the Framers of the Pennsylvania constitution would have been aware. These objections were summarized in a pamphlet, also published in 1776, entitled *The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural*

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copy of this pamphlet, contemporaneously published by Henry Miller in 1776, is available on microform, *Early American Imprints*, First Series, No. 14993 (Readex Microprint, 1985). The edition of the *Pennsylvania Evening Post* published on September 10, 1776, wherein this draft first appeared in newspaper form, can be found in *Early American Newspapers*, First Series (microfilm). All early newspapers cited hereinafter are likewise available in the latter source.

[24] *Shaeffer*, supra, 98 Pa. Mag. Hist. & Biog. at 425.

[25] *Pennsylvania Packet*, 2 (Sept. 17, 1776), *citing* "The ancient Saxon or English Constitution published by Mr. R. Bell," the latter of which is reprinted in 1 *Hyneman & Lutz, American Political Writing During the Founding Era*, 340 (1983) (hereinafter "*Hyneman*").

Freedom.[26] In this pamphlet an anonymous dissenter observed that:

> "[T]o have a state represented adequately under this plan [in which representation is "determined entirely according to the number of inhabitants"], would puzzle the brain of a philosopher. Indeed, to effect it some townships must be cut to pieces, others tacked together – and, at best, many parts would remain defective. And, if we look into this matter critically, we shall find it still more egregious. It is an old observation, the *political bodies should be immortal* – a government is not founded for a day or a year, and, for that reason, should be erected upon some invariable principles. Grant, for a moment, that the number of people is the only measure of representation; as often then, as the former increases or diminishes, the latter must of consequence; as often, as the inhabitants in a state vary their situation, the weight of legislation changes; and, accordingly, the balance of power is subject to continual, and frequently unforseen alterations. Turn which way we will upon this plan, we shall find unsurmountable difficulties: So that those, who have adopted this measure, are either too short-sighted, to see the future interests of society, or so secret and designing, as to take the advantage of such undeterminate principles."[27]

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[26] *Reprinted* in *Hyneman*, supra, at 390. Although Hynemen has attributed this pamphlet to a resident of New Hampshire, neither its author nor the place of its original publication are known. *Cushing, The People the Best Governors*, 1 Am. Hist. Rev. 284, 285 (1895-1896).

[27] *Hyneman*, supra, 395. Perhaps coincidentally, the Pennsylvania State Convention of 1776 "could boast of possession, among [its] members, two philosophers, Franklin and Rittenhouse." *Barton, Memoirs*

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Viewed in the historical context of the foregoing writings, the purposes of the final version of Section 17 of the Pennsylvania Constitution, as adopted on September 28, 1776, become clear. By providing that electoral districts, once established on the basis of an enumeration, would thereafter "continue for the next seven years" until the taking of a subsequent census, Section 17 was plainly intended not only to respond to the published objections of "Demophilus" and his insistence that elections for representatives be by districts (to the extent that the City of Philadelphia and the remainder of Philadelphia County were provided with separate representation), but also to solve the "puzzle" (and overcome the "unsurmountable difficulties") attendant to the principle of equal representation based on equal population. Most relevant to the present case however, is that Section 17 also appears to have been designed to remove the risk, identified in the last quoted pamphlet, of electoral manipulation by "secret and designing" individuals who might attempt to "take advantage" of "indeterminate principles." Consistent with this understanding, another anonymous pamphleteer, writing a short time later in Boston under the pseudonym "Equal Representation," advocated adopting Paine's constitutional proposal, in the State of Massachusetts, stating that: "To preserve this representation equal, thro' all ages and changes of time, taking warning from the unequal representation of Britain ... [l]et it be agreed ... [to] renew this proportion of representatives by the valuation,

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of the Life of David Rittenhouse, 262 (1813) (*Early American Imprints*, 2d Series, No. 27835) (microform).

once in ten or fifteen years, to preserve an equality *to the latest period.*"[28]

The redistricting practices of Pennsylvania prior to adoption of the new *federal* constitution at Philadelphia on September 17, 1787, which would have provided the Framers with an important "example" of how the new federal Elections Clause would operate,[29] disclose that it was only a change in population, as demonstrated by the taking of a new census, that would authorize alteration of election districts. On September 13, 1785, the Pennsylvania Assembly under its new State constitution enacted legislation that required its existing Assembly districts (previously enacted on September 24, 1779) to remain unaltered "until a new proportion of representation in the legislature shall be ascertained and appointed" according "to the number of taxable inhabitants with in [sic] each city and county."[30] Thereafter, on March 3, 1786, the Pennsylvania Assembly passed a census act "to ascertain the number of taxable inhabitants within the city of Philadelphia, and within each of the counties of th[e] commonwealth."[31] On September 27, 1786, after reiterating its explicit constitutional declaration that "representation in

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[28] *The Continental Journal and Weekly Advertiser*, 2 (Boston, Jan. 15, 1778) (italics added). The "unequal representation of Britain" referenced by this author obviously refers to the "rotten boroughs" later objected to at the Federal Convention by, among others, James Wilson of Pennsylvania. *Wesberry v. Sanders*, supra, 376 U.S. at 14-15.

[29] *Williams*, supra, 62 Temp.L.Rev., at 579 ("Because the Continental Congress met in Philadelphia, delegates were aware of the Pennsylvania Constitution" of 1776).

[30] Laws of Pennsylvania, 9th Session, ch. CCXXI, Section 4 (Library of Congress, Microform).

[31] Laws of Pennsylvania, 10th Session, ch. CCLI.

proportion to the number of taxable inhabitants is the only principle which can at all times secure equal liberty," the Pennsylvania Assembly enacted new legislative districts "in pursuance of" the returns of the foregoing census.[32] The districts so enacted were ordained to thereafter remain in effect "for the ensuing seven years," and "during each of the said seven years," according to "the true intent and meaning" of the Pennsylvania constitution.[33]

II. Usage of the Elections Clause Power by the Several State Legislatures During the First Decade of the Republic.

The behavior of the original thirteen States immediately after the first federal enumeration and apportionment reinforces the notion that the Elections Clause was understood to authorize congressional redistricting *only once* after each federal apportionment unless justified by a legitimate regulatory purpose (*i.e.*, to respond to a *quantified* shift or growth in population). Excluding Delaware and Rhode Island, which under the Constitutional apportionment were entitled to only one Representative each,[34] seven of the remaining eleven original States elected their Representatives to the First Congress by districts.[35]

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[32] Laws of Pennsylvania, 10th Session, ch. CCCII, Section I.

[33] *Id.*, Preamble and Section II.

[34] U.S.Const., Article I, Section 2.

[35] *Martis, The Historical Atlas of United States Congressional Districts*, 8 (1982) (hereinafter "*Martis*"). States electing Representatives to the First Congress by congressional districts were Georgia, Maryland, Massachusetts, New York, North Carolina, South Carolina, and Virginia, while the States of Connecticut, New Hampshire, New Jersey and Pennsylvania elected their Representatives by "general ticket." *Ibid.*

Between the first federal apportionment act of April 14, 1792,[36] and the second apportionment act of January 14, 1802,[37] only three of these States, Pennsylvania, New York, and Massachusetts, enacted multiple congressional redistricting statutes. As explained below, in both New York and Pennsylvania, wherein population enumerations had previously been used to govern representation, a neutral regulatory purpose or justification existed for each revision of districts. In the third State, Massachusetts, the reason for redistricting, while unconstitutional under present jurisprudence, would still have presented a more legitimate regulatory purpose than that presented by the State of Texas in the present case.

Intervening septennial censuses were conducted under State law in both New York and Pennsylvania after their initial redistricting following the first federal decennial census, and before their subsequent intra-decennial revisions of congressional districts. New York enacted its first congressional districting law, after the first federal apportionment, on December 18, 1792.[38] This statute provided (in its ultimate paragraph) that "this act shall continue in force, until a future census of the inhabitants of this State shall be taken, by virtue of the constitution of this State, or by any law of the legislature thereof, or of the Congress of the United States of America."[39] On March 3, 1795, the New York Assembly passed legislation to require the taking of a new census, and the returns for

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[36] 1 Stat. 253, ch. 23 (1792).

[37] 2 Stat. 128, ch. 1 (1802).

[38] Laws of New York, Sixteenth Session, ch. 5 (Library of Congress, Microform); *Martis*, supra, 247.

[39] Laws of New York, Sixteenth Session, ch. 5.

this census were reported back to the Assembly, in accordance with state law, on January 20, 1796.[40] Thereafter, on March 28, 1797, new congressional districts were enacted.[41] Finally, on February 28, 1800, the Sixth Congress passed the second Census Act, which directed that an enumeration of the inhabitants of the United States be taken, to commence "on the first Monday of August next [August 7, 1800]."[42] At the next session of its legislature, on March 24, 1801, New York enacted new congressional districts on the basis of returns received from this federal census.[43]

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[40] Laws of New York, Eighteenth Session, ch. 11; Journal of the Assembly of the State of New York, Nineteenth Session, 30-33 (hereinafter "*New York Assembly Journal*") (available online with subscription at "Eighteenth Century Collections Online").

[41] Laws of New York, Twentieth Session, ch. 62.

[42] 2 Stat. 11, ch. 12 (1800).

[43] Laws of New York, Twenty-Fourth Session, ch. 64. The federal Census Act at this time required that a "schedule containing the number of inhabitants of [a] district . . . be set up at two of the most public places" by the deputized enumerators or assistants in each district, and "there to remain for the inspection of all concerned." 2 Stat. 11, ch. 12, Section 7 (1800). It appears that under this regime State officials found publication of federal census returns, prior to a new federal apportionment, sufficient to warrant revision of electoral districts. *See, Cahill v. Leopold*, 103 A. 2d 818, 824 n. 7 (Conn. 1954). Completed census returns for some districts in New York were reported little more than a month after enumeration had commenced, *see e.g.*, *New-York Commercial Advertiser*, at 3 (Monday, Sept. 8, 1800) (noting an "increase of 1,437 inhabitants in ten years" in the Town of Portland, N.Y., under "[t]he new census of the United States"); *id.*, at 3 (Monday, Oct. 13, 1800) (noting population increase in Town of Newburyport, N.Y, as shown by the new federal census). Notably, for reasons to be explained shortly, this particular legislative revision of congressional districts in 1801 was recommended by James Kent, then Associate Justice of the New York Supreme Court who, along with Associate Justice Jacob Radcliff, had been assigned the task of suggesting

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The congressional redistricting practices in Pennsylvania during this period followed the pattern found in New York. A septennial census was conducted in Pennsylvania from June to October of 1793, pursuant to an Act passed by the Pennsylvania Assembly on April 10, 1793.[44] Pennsylvania thereafter enacted its first congressional districting law after the first federal apportionment, along with new State legislative districts, on April 22, 1794.[45] Under these two Acts, Pennsylvania's state legislative districts were to remain unaltered "until the next enumeration of the taxable inhabitants, and an apportionment thereon"; and the *congressional* districts so enacted were to remain unaltered "until an enumeration of the inhabitants of the United States shall be taken, agreeably to the constitution and laws of the said United States."[46]

Although one scholar, Professor Ken Martis, has reported that Pennsylvania enacted new congressional districts on March 12, 1800 (before the next federal census and apportionment);[47] close examination of the statute cited by Professor Martis discloses that it was only the creation of several new counties, not electoral redistricting, that was intended.[48] This statute provided that most if not all of the effected counties, new and old, would "continue

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comprehensive revisions to the statutes of the State of New York. *New York Assembly Journal*, Twenty-fourth Session, 45, 53 (Feb. 5, 1801).

[44] Laws of Pennsylvania, 17th Session, ch. CLXIII, Section II.

[45] Laws of Pennsylvania, 18th Session, ch. CCL (State legislative districts); *id.*, ch. CCLVI (congressional districts).

[46] Laws of Pennsylvania, 18th Session, ch. CCL, Section IV (State legislative districts); *id.*, ch. CCLVI, Section II (congressional districts).

[47] *See Martis*, supra, 263, citing "c. 264."

[48] Laws of Pennsylvania, 24th Session, ch. CCLXIV.

to be a district for the election of senators . . . and representatives in Congress," "until an enumeration of the taxable inhabitants shall be made within the before described counties."[49] Such an enumeration had already been ordered by the Pennsylvania Assembly less than a week earlier on March 7, 1800;[50] new State legislative districts were thereafter enacted on February 27, 1801;[51] and, following the completion of the second federal census and passage of the federal apportionment act on January 14, 1802, Pennsylvania enacted new congressional districts on April 2, 1802.[52] In this last statute, the Pennsylvania Assembly once again provided that the congressional districts so enacted were to remain unaltered "until an enumeration of the inhabitants of the United States shall be taken, agreeably to the constitution and laws of the said United States."[53]

The actions of the third original State to engage in multiple congressional redistricting between the first and second federal censuses, Massachusetts, provides no support for any argument that the Elections Clause was understood to authorize such a practice. The colonial constitution of Massachusetts, like that of New Hampshire, authorized alteration of legislative districts "from time to time"; but the constitutional authority for an adjustment of representation in those colonies was not based upon population at all, but rather was contingent solely upon a change in "the proportion of the public taxes

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[49] *Id.*, ch. CCLXIV, Section XII.

[50] Laws of Pennsylvania, 24th Session, ch. CCLIII.

[51] Laws of Pennsylvania, 25th Session, ch. CCCXXVI.

[52] Laws of Pennsylvania, 26th Session, ch. LXXIII.

[53] *Id.*, ch. LXXIII, Section 2.

paid by the said districts,"[54] with the calculation and payment of taxes received from each district presumably occurring more than once every enumeration of the populous. The intra-decennial revision of congressional districts by Massachusetts thus appears to have been based on either a standing practice under its State constitution, or on a faulty and now disapproved interpretation of the Federal Constitution, or both. It is of course now settled that the Framers intended that population alone, and not property valuations, must govern representation in the U.S. House of Representatives.[55] Moreover, while alteration of congressional districts in response to an intra-decennial calculation (or payment) of taxes could not presently provide a constitutionally valid purpose to redistrict; Massachusetts' use of property valuations to govern representation assuredly provided, at this time, a more neutral justification for multiple intra-decennial redistricting than does the redistricting in the present case, which is unrelated to increases (or decreases) in either wealth, property value *or* population.

III. The Contemporaneous Understanding of the Temporal Scope of Redistricting Power under the Elections Clause.

The first obvious incident of multiple congressional redistricting between federal decennial enumerations *not* supported by any legitimate regulatory purpose (that is, unrelated to any purpose to accommodate for population shifts or growth), occurred in the State of New York in

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[54] Mass.Const. of 1780, Chapter I, Section II, Article I, 3 *Thorpe*, 1895; N.H. Const. of 1784, 4 *Thorpe*, 2459.

[55] *Wesberry v. Sanders*, supra, 376 U.S. at 8-9.

1804. This redistricting was swiftly followed by yet another alteration of congressional districts in that State in 1808.[56] Far from receiving universal acceptance as merely a lawful exercise of power under the Elections Clause however, these intra-decennial congressional redistricting enactments went neither unnoticed nor unchallenged by the electorate. In an editorial entitled "To the Electors of Members of Congress" (signed under the pseudonym "SENEX"),[57] one adversely affected observer objected that "[a]ccording to the constitution, when a new census and apportionment of representatives are made by Congress, the state legislatures should respectively *prescribe* the *manner* of their choice; and this manner, until altered by Congress, ought to remain the same till a new apportionment of representatives shall be made." *Ibid.* (italics in original). While the anonymous author of this editorial, "SENEX," noted that more frequent congressional redistricting might *arguably* be justified "as the states from time to time [might] enumerate their own inhabitants, and as thereby they m[ight] discover changes and inequalities in the districts, [and should] not [be] restrained from correcting the same by altering the districts," *ibid.*; in SENEX's view, no such alteration of valid congressional districts, as "ha[d] led to these frequent violations of the [federal] constitution" in New York in 1804 and 1808, could constitutionally be justified solely by illegitimate "motives

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[56] *See Griffith*, supra, 56-59.

[57] *The New-York Herald*, 2 (April 27, 1808). The *New-York Herald* was the semi-weekly edition of the *New-York Evening Post* founded in 1801 by Alexander Hamilton "and a group of his intimate political lieutenants." Unlike the *Evening Post*, the *Herald* from its inception was distributed "to distant subscribers from Boston to Savannah." See *Nevins, The Evening Post: A Century of Journalism*, 9, 20 (1922).

. . . [wherein] the object has been to preserve power in the hands of those who at present possess and abuse it." *Ibid.*[58]

The construction of the Elections Clause given by SENEX was met with deafening silence from those most likely to challenge SENEX's argument. A careful examination of the contemporaneous editions of the *New-York Evening Post*'s most tenacious political rival, the *New-York American Citizen* published by the "slashing and fearless" Democratic-Republican James Cheetham,[59] discloses that from Monday, April 25, 1808 (the date on which the SENEX editorial was originally published in the *Evening Post*) through at least Tuesday, May 31, 1808, there is not a single published assertion by either Cheetham, or any contributor to his political news journal, that disputes SENEX's interpretation of the Elections Clause.[60] This striking non-response stands in stark contrast to Cheetham's daily diatribes that specifically challenged virtually every other editorial published by the *Evening Post*.[61] There is no possibility that SENEX's twice published

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[58] The complete text of the SENEX editorial, along with a description of the notable personages evidently associated with its publication (including Rufus King, John Jay, James Kent and Gouverneur Morris), appears in *Plaintiff Henderson's Revised Supplemental Brief on Remand*, No. 2:03-CV-354 (E.D. Tex.) (Doc. 264-2) (filed June 2, 2005).

[59] *Nevins*, supra, at 12.

[60] As in the case of the *New-York Evening Post*, the *American Citizen* for these dates is available on microfilm (Early American Newspapers) (Film No. 26, 131; Reel 152; part 7), at the Perry-Castenda Library, University of Texas at Austin, in addition to the Library of Congress.

[61] *See e.g.*, *The American Citizen* (April 25, 1808) (Cheetham editorial replying to "some quibbles unworthy of notice [made by "Coleman," the *Evening Post*'s editor] . . . in reference to Mr. [Gurdon Saltonstall] Mumford," an incumbent Democratic-Republican Congressman from New York; *id.* (April 29, 1808) (Cheetham editorial

(Continued on following page)

editorial escaped the notice of Cheetham, his readers and literary contributors. The Appellee therefore finds it telling that the State of Texas herein now attempts to invoke a legal argument that either never occurred to, or was deemed too feeble to be raised by, the outspoken political activists in Cheetham's party who were alive and, no doubt, politically conscious when the Elections Clause was debated and ratified.

IV. Chancellor James Kent's View on Multiple Intra-Census Electoral Redistricting, Given When Construing a Redistricting Provision on which the Elections Clause was Modeled.

The assertion made by SENEX – that multiple redistricting between enumerations violates the constitutionally protected rights of voters, was not a view that was limited, during the earliest years of the Nation, to the general populace. Less than a year after the foregoing protest by SENEX, the New York Council of Revision, in a decision reported by renowned Chief Justice (and later Chancellor) James Kent, construed Article IV of the New York Constitution, as amended in 1801, to prohibit multiple alteration of state senate districts after each census.[62]

In 1807, the State of New York had conducted a census pursuant to Article V of the Constitution of 1777,

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providing "[a]n answer to 'the Friend of Justice' published in the *New-York Evening Post* of the 27th instant.").

[62] Other than *compelling* legislative action after each census, Article IV of the New York Constitution, as amended in 1801, adhered to the post-census apportionment and redistricting provisions contained in Articles V and XII of the New York Constitution of 1777. 5 *Thorpe* 2629-2631, 2639.

which, like the Pennsylvania Constitution, provided that a census be taken every seven years.[63] On April 1, 1808, the New York legislature enacted new legislative districts utilizing that census of 1807. In March of 1809, however, the New York legislature attempted to enact new State senate districts a *second* time after the census of 1807. On March 14, 1809, as noted, the New York Council of Revision intervened to prohibit alteration of the earlier districts established by the Legislature in 1808, finding that Article IV did not authorize enactment of legislative districts more than once after each census.[64] In his written opinion for the Council of Revision, Chancellor Kent explained in relevant part that:

> "The bill is to be considered either as a new apportionment of the Senators, or as a new revision of the districts, and in either view it appears to the Council to be inconsistent with the spirit of the Constitution and the public good. . . . By the fourth article of the amendments to the Constitution [ratified in 1801] it is provided that upon the return of every census the Legislature shall apportion the Senators and members of the Assembly; and the Legislature did accordingly, on the first day of April last, by the act entitled 'An act apportioning the representation in the Legislature according to the rule prescribed by the Constitution,' make such apportionment in pursuance of the census in 1807. The apportionment having thus been made, the provision in the Constitution is complied with, and it ceases to operate until the taking of another census. . . .

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[63] *See* 5 *Thorpe*, 2629-2630.

[64] *Alfred B. Street, The Council of Revision of New York*, 352-354 (1859) (hereinafter "*Street*").

> [I]t is extremely important, both as it respects the security of the Constitution and the just rights of the electors which are concerned in these apportionments, that when an apportionment is once made it should be steadily adhered to until the return of another census. There is no rule for making another apportionment by the census of 1807, and that [census] becomes an uncertain guide for a second apportionment, because the population of the districts has varied in the meantime and that variation increases every year. If a second apportionment may be made now, it may equally be made in any future session and even in the year preceding the taking of another census, and thus all accuracy in the rule of the apportionment would be lost and the constitutional objects of the census defeated."[65]

Although the foregoing decision was later derided as an *ultra vires* act at the New York Constitutional Convention of 1821 (by an aggrieved partisan, Anti-Federalist former New York Governor, and then Vice President, Daniel D. Tompkins);[66] the delegates at that convention, without a single dissenting voice, made explicit what had theretofore been generally understood as intended by the New York Constitution since its adoption in 1777. On the Report of the Committee on Legislative Departments chaired by Rufus King,[67] the New York Constitution was

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[65] *Street*, at 352-354.

[66] *See* Nathaniel H. Carter & William L. Stone, *Reports of the Proceedings and Debates of the [New York] Convention of 1821*, 79-80 (1821) (hereinafter "*New York Debates of 1821*").

[67] Rufus King served as a delegate from Massachusetts to the Federal Constitutional Convention of 1787, 3 *Farrand* at 557; and as a delegate to the Massachusetts ratification convention. At the Massachusetts convention, King was a prominent figure in debate concerning

(Continued on following page)

amended to more clearly express, in accord with the prior decision of the Council of Revision, "that a just apportionment ... may be made by the legislature at the first session after the return of every census, *which apportionment shall remain unaltered until the return of another census.*"[68] Such is the interpretation given by Chancellor Kent ("the country's foremost legal scholar"),[69] Rufus King, and their contemporaries, to a provision in the New York Constitution upon which, alongside Section 17 of the Pennsylvania Constitution of 1776, the Elections Clause was modeled.

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the Elections Clause. 2 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 50 (Jan. 21, 1788) (Elliot ed. 1937) (hereinafter "*Elliot's Debates*"). At the Federal Constitutional Convention, King was elected to the five-member Committee that addressed, among other things, the method of Representation in the National Legislature, 1 *Farrand* at 542. After relocating to the State of New York later in 1788, King was elected to the First Congress as U.S. Senator from New York; and, as indicated, was a delegate to the New York Constitutional Convention of 1821.

[68] N.Y.Const., Sec. 6 (1821); 5 *Thorpe*, supra, at 2641 (italics added); *New York Debates of 1821*, at 142, 581-582. The canard that Kent, a Federalist, was motivated by political partisanship when writing the aforementioned opinion for the Council of Revision, *see Griffith*, supra, 60 ("It appears to have been a party vote"), is wholly undercut by the fact that Kent's opinion was joined by two Democratic-Republicans, John Lansing and Smith Thompson, the latter of whom was a "staunch" member of that party. The votes of Lansing and Thompson were necessary for Kent's 4-3 majority opinion. *Horton, James Kent: A Study in Conservatism*, 139 and n. 53 (1939 ed.); *Griffith*, 60 n. 1. It is perhaps also noteworthy that Kent was a member of the Sixteenth Session of the New York Assembly which, in 1792, enacted a congressional redistricting statute that contained an *express* prohibition on multiple intra-census congressional redistricting. *See* footnotes 38 and 39, supra; *New York Assembly Journal*, Sixteenth Session, supra, 3 (Nov. 6, 1792).

[69] *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278 n. 13 (1977).

As should be evident from the foregoing history, the power conveyed to State legislatures by the Elections Clause must bear some relationship to the purpose of that delegation. With respect to the power to redistrict, the sole purpose of that delegation is undeniable. In answer to the question of why congressional districts were not explicitly prescribed and permanently delineated in the Federal Constitution, Rufus King explained at the Massachusetts ratifying convention that:

> "If it was practicable, he said, it would be necessary to have a district the fixed place; but this is liable to exceptions; as a district that may now be settled, may in time be scarcely inhabited; and the back country, now scarcely inhabited, may be fully settled. Suppose this state thrown into eight districts, and a member apportioned to each; if the numbers increase, the representatives and districts will be increased. The matter, therefore, must be left subject to the regulation of the state legislature, or the general government."[70]

The power to redistrict delegated by the Elections Clause is not, and never has been, animated solely by the "changing and shifting" partisan whims or preferences of a political majority or "ruling faction" within a State or State legislature. Were that the rule, Representatives in Congress "w[ould] not be chosen *by the people*, but w[ould] be the representatives of a faction of [a] state."[71] The Elections Clause power to redistrict, as described by Rufus King above, was a necessity arising from the principle of equal representation based on equal population; and as

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[70] 2 *Elliot's Debates*, 50 (Jan. 21, 1788).

[71] 2 *Elliot's Debates*, 50-51 (italics in original).

explained by James Madison at the Federal Convention, the Elections Clause was not intended to enable, but rather to obstruct when possible, State legislatures that might otherwise "mould their regulations as to favor the candidates they wished to succeed."[72]

More than merely "the best of an ugly array of choices," *Session v. Perry*, supra, 298 F.Supp.2d at 475; Chancellor Kent's "principled discussion" of redistricting power, as quoted herein, incisively recognized, after years of legal study and experience as both a legislator and a jurist, the "extreme" constitutional importance of "stability and continuity" in the electoral system, *Reynolds v. Sims*, supra, 377 U.S. at 583; as well as the principle that redistricting must be legitimately related to the "basic aim" of equal representation based on equal population. Chancellor Kent's reasoning does not rely on any amorphous (and "judicially unmanageable") right to "fairness."[73] Rather, it describes a constitutional rule that is now "well-accepted" across the Nation; that has a pedigree traceable to Section 17 of the Pennsylvania Constitution of 1776; and that has the laudable effect of securing "the policy, so carefully guarded in the constitution, of preventing a change of representative districts intermediate two enumerations, for partisan purposes." *People ex rel. Henderson v. Westchester Board of Supervisors*, 41 N.E. 563, 568 (N.Y. 1895).

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[72] 2 *Farrand*, at 240-241.

[73] *Vieth v. Jubelirer*, supra, 541 U.S. at 291 (plurality opinion per Scalia, J.) ("'Fairness' does not seem to us a judicially manageable standard.")

Simply stated, the State of Texas, with the approval of the District Court, has elevated a purely partisan purpose to the status of a *bona fide* legitimate regulatory objective under the Elections Clause when, as here, such a purpose is conceded by the State of Texas to be wholly unaccompanied by (and wholly unrelated to) any aim to maintain equal representation based on equal population. Far from meriting the reward of undeserved partisan power in the United States Congress, the State of Texas' deliberate, egregious, and unjustifiable violation of Appellants' fundamental representational rights – rights intended by the Framers to be guaranteed Appellants by the Constitution of the United States, warrants "stern condemnation" by this Honorable Court.[74]

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[74] *Cox v. Larios*, supra, 542 U.S. at 951 (Stevens, J., concurring).

CONCLUSION

For the reasons stated, the Court must reverse the decision of the District Court below, and should remand Appellants' case with directions that the relief sought by Appellants, *i.e.*, restoration of the congressional districts established by the District Court in *Balderas v. Texas*, No. 6:01-CV-158 (E.D. Tex.), *aff'd memo.*, 536 U.S. 919 (2002), be granted with all deliberate speed, and in time for valid elections to the 1st Session of 110th Congress of the United States.

Respectfully submitted,

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In The
Supreme Court of the United States

LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The
United States District Court
For The Eastern District Of Texas

BRIEF FOR APPELLEE CHARLES SOECHTING IN SUPPORT OF APPELLANTS

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EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

QUESTION PRESENTED

Whether the 2003 Texas congressional redistricting plan is an excessively partisan gerrymander, in violation of the United States Constitution.

PARTIES TO THE PROCEEDING

Defendant-Appellee filing this Brief is Charles Soechting, Chairman of the Texas Democratic Party, who was sued in his official capacity.

Plaintiffs in the court below include the "Jackson Plaintiffs" (Eddie Jackson, Barbara Marshall, Gertrude "Traci" Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, J.B. Mayfield, Roy Stanley, Phyllis Cottle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T. Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R. Delco, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J. Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willia Wooten, Ana Yañez-Correa, and Mike Zuniga, Jr.); the "Democratic Congressional Intervenors" (Chris Bell, Gene Green, Nick Lampson, Lester Bellow, Homer Guillory, John Bland, and Reverend Willie Davis); the League of United Latin American Citizens (LULAC); the "Valdez-Cox Plaintiff-Intervenors" (Juanita Valdez-Cox, Leo Montalvo, and William R. Leo); the Texas Coalition of Black Democrats (TCBD); the Texas Conference of National Association for the Advancement of Colored People Branches (Texas-NAACP); Gustavo Luis "Gus" Garcia; the "Cherokee County Plaintiff" (Frenchie Henderson); the "GI Forum Plaintiffs" (the American GI Forum of Texas, LULAC District 7, Simon Balderas, Gilberto Torres, and Eli Romero); Webb County and Cameron County; Congresswoman Sheila Jackson Lee and Congresswoman Eddie Bernice Johnson; and Travis County and the City of Austin.

PARTIES TO THE PROCEEDING – Continued

Defendant-Appellees in addition to Charles Soechting are Rick Perry, Governor of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Roger Williams, Secretary of State of Texas; Tina Benkiser, Chairman of the Republican Party of Texas; and the State of Texas. All individual Defendant-Appellees were sued in their official capacities.

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BRIEF OF APPELLEE CHARLES SOECHTING IN SUPPORT OF APPELLANTS

In January 2004, a three-judge District Court upheld Texas's 2003 congressional redistricting plan against various constitutional and statutory challenges. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004). On appeal last fall, this Court vacated and remanded the District Court's decision for further consideration of plaintiffs' partisan gerrymandering claims in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *See Jackson v. Perry*, 125 S. Ct. 351 (2004). On remand, the District Court reaffirmed its prior ruling. It concluded that the Texas gerrymander was not *more* partisan than the Pennsylvania gerrymander that this Court let stand in *Vieth*, and it refused to announce doctrine geared to the context of voluntary off-cycle redistrictings – i.e., redistrictings not required by law, including this Court's one-person, one-vote jurisprudence. That ruling requires reversal by this Court. The Court should clarify what it means for a redistricting plan to be tainted by unconstitutionally excessive partisanship and announce a judicially manageable test (one that the Texas plan manifestly fails) that begins to implement this constitutional understanding.

OPINIONS BELOW

The three-judge District Court's unreported majority and concurring opinions are reprinted at pages 1a to 55a of Appellants Eddie Jackson *et al.*'s Jurisdictional Statement ("J.S. App."). The District Court's final judgment is reprinted at J.S. App. 56a.

JURISDICTION

The District Court issued its ruling on June 9, 2005. J.S. App. 56a. Pursuant to 28 U.S.C. § 2101(b), Appellants Eddie Jackson *et al.* timely filed notices of appeal on July 5, 2005, invoking the Court's jurisdiction under 28 U.S.C. § 1253. This Court noted probable jurisdiction on December 12, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the Constitution in part prohibits laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Section 2, Clause 1 of the Constitution provides in part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States."

STATEMENT OF THE CASE

As a result of the 2000 federal decennial census, Texas became entitled to two more seats in Congress, raising its total to 32. However, the Texas Legislature did not reach agreement on a redistricting plan, and Texas Governor Rick Perry declined to call a special session. *Perry v. Del Rio*, 66 S.W.2d 239, 243 n.7 (Tex. 2001). The task thus fell

to a three-judge District Court which ultimately and unanimously imposed a new congressional map, designated Plan 1151C. Neither the State of Texas nor any other defendant appealed the District Court's decision, but a group of voters did. This Court summarily affirmed the District Court's ruling. *Balderas v. Texas*, 536 U.S. 919 (2002). The court-drawn Plan 1151C therefore governed Texas's 2002 congressional election.

That election generated a congressional delegation with 15 Republicans and 17 Democrats – a delegation that became evenly split when one of the Democrats subsequently switched parties. Meanwhile, Republicans enjoyed success in the state legislative elections, winning unified control of the state government. Responding to this shift in state politics, House Majority Leader Tom DeLay, directly and through his organization, Texans for a Republican Majority, prodded state officials to redraw the state congressional map to promote the party's interests.[1] The newly elected 78th Legislature complied. Upon convening in 2003, it announced that it would, for the first time, consider congressional redistricting in the middle of a decade.

This unprecedented effort met resistance. Near the end of the regular session, a group of Democratic state representatives left Texas for Ardmore, Oklahoma, thereby breaking quorum.[2] After the regular session ended, however, Governor Perry called the Texas Legislature into

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[1] DeLay's role in the redistricting was widely publicized. For one account, see Lou Dubose & Jan Reid, *The Hammer: Tom DeLay, God, Money, and the Rise of the Republican Congress* 199-225 (2004).

[2] Tr., Dec. 15, 2003, 1:00 p.m., at 76-77 (Rep. Richard Raymond).